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SUPREME COURT, U.S.

Case No. A-592 (80-1331)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES WILLIS MALONE, JR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE STATE OF FLORIDA'S PETITION FOR WRIT OF CERTIORARI

WILLIAM C. MCLAIN

AND

SAMUEL ROBERT MANDELBAUM,
Assistant Public Defenders
Hillsborough Courthouse Annex
Tampa, Florida 33602

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	PAGE NO.
STATEMENT OF THE CASE	1-4
ARGUMENT	
THIS COURT SHOULD NOT ISSUE THE WRIT SINCE THERE IS NOT ANY REAL AND SUBSTANTIAL FEDERAL QUESTION RIPE FOR REVIEW WHICH WOULD BE DISPOSITIVE OF THE ISSUES IN THIS CAUSE.	5-10
CONCLUSION	11
APPENDIX	1a
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	PAGE
Durley v. Mayo, 351 U.S. 277 (1956)	5
Hall v. State, 66 So. 2d 863 (Fla., 1953)	6
Henry v. Mississippi, 379 U.S. 443, 446 (1965)	5
Malone v. State, 390 So. 2d 338 (Fla., 1980)	1
Martin v. Walton, 368 U.S. 25 (1961)	5
Massiah v. United States, 377 U.S. 201 (1964)	9 & 10
Mental Hygiene Department v. Kirchner, 380 U.S. 194 (1965)	5
Miranda v. Arizona, 384 U.S. 436 (1966)	8, 9, & 11
Paul v. State, 365 So. 2d 1063, 1064 (Fla. 1st DCA, 1979)	7
Sanks v. Georgia, 401 U.S. 144 (1970)	5
United States v. Henry, ____ U.S. ____, 65 L. Ed. 2d 115 (1980)	3, 4, 6, 8, & 11
Wilner v. Character Committee, 373 U.S. 96 (1963)	5
OTHER RESOURCES:	
Rule 3.151(a), Florida Rules of Criminal Procedure	6

STATEMENT OF THE CASE

On July 14, 1977, Jessee Woodward appeared at the residence in St. Petersburg, Florida where the Respondent and his friend and co-perpetrator, Freddie Lee Morris, were staying. Three days earlier, the Respondent and Morris had attempted to commit a robbery and kidnapping. They suspected that Woodward was a detective investigating those crimes, but, in fact, he was not. At gunpoint, they searched Woodward and took two dollars and a wallet from him. Then using Woodward's automobile, they forced him to accompany them on a forty-mile trip to a remote, deserted location on the outskirts of Tampa. During this trip, Woodward pleaded for his life. When they arrived, Respondent took Woodward away from the automobile into a marshy, wooded area and shot him twice in the back of his head. Then, after visiting some friends in Tampa, the Respondent and Morris drove around in Woodward's automobile looking for a place to rob. They finally selected a Tampa service station and, at gunpoint, robbed the attendant, Manuel Tanner, taking fifty to sixty dollars and two hundred to three hundred packs of cigarettes. During the robbery, Respondent Malone beat Tanner to death with a blunt, pipe-like instrument. As a result of being struck on the head approximately ten times, Tanner sustained severe skull fractures, numerous fractures on the right side of his scalp and on the base of his skull, and ten lacerations on his scalp. The police later found Woodward's car parked in an apartment area in Tampa. From several items of physical evidence found in the automobile, including Respondent's fingerprints, the police were able to connect Respondent with Woodward's automobile and with the service station robbery. See Malone v. State, 390 So. 2d 338 (Fla., 1980).

On August 17, 1977, an Indictment was filed against the Respondent, charging him with robbery and the first degree murder of Tanner. Subsequently, on November 2, 1977, a

second Indictment was filed, charging the Respondent with the first degree murder of Woodward. On March 3, 1978, pursuant to Respondent's motion, the trial judge entered an order consolidating the three offenses charged in the two Indictments on the grounds that the robbery and two murders "are based on the same act or transaction or two or more connected acts or transactions." (See annexed Appendix).

Thereafter, Respondent was convicted of the premeditated, first-degree murders of Jessee Woodward and Manuel Tanner and the robbery of the service station. The jury recommended death sentences. The trial court sentenced Respondent to death for each of the murders and to life imprisonment for the robbery.

On appeal to the Florida Supreme Court, Respondent argued that his convictions should be reversed for a new trial since the trial judge erred in denying his motion to suppress certain incriminating statements made to him by one of his cellmates, who, unknown to Respondent, was an informer for the State. Respondent conceded that these statements were not coerced and were voluntary, but argued that they could not be used against him because they were deliberately elicited by a State agent in the absence of his counsel and without his being informed of his Miranda rights by the informant. 390 So. 2d at 339.

The informer, who was also a prisoner, first met the Respondent in the Pinellas County jail in September, 1977. Two and one-half weeks after meeting Respondent, the informer met Detective Hazzard who asked him to assist in finding the body of Jessee Woodward by "just listening" to whatever Respondent said about the case and reporting anything he heard about where the body was located. 390 So. 2d at 339.

Detective Hazzard not only advised the informer "of the particulars of the Woodward murder, Case Number 77-7178, but he also advised him about the service station robbery and how the other man [Tanner] was killed." [See Petitioner's

Appendix to Petition, page A-29].

The informer testified that he did not ask Respondent where the body was or in any way interrogate him, but he did suggest a plan to the police by which he might be able to obtain information from Respondent as to where Woodward's body was hidden. The plan was to have the informer transferred to another county jail and then to have him come back and visit Respondent in civilian clothes. Prior to being transferred, the informer went back to his cell and told Respondent that he was being released and assured Respondent that he knew a black female attorney whom he would try to retain for Respondent. Under the misimpression that the informer would be able to assist him on the outside, Respondent then told the informer that he had killed Woodward, that there were several things he wanted the informer to do for him, and that he would tell the informer about them when he returned on visitation day. Some time later, dressed in civilian clothes, the informer returned to the jail, as requested by Respondent. Anxious to ensure that he would not be linked with Woodward's body, Respondent gave the informer directions to where the body was located and instructed the informer to dispose of the remains. From the directions given by Respondent the police were unable to find the body. Pursuant to police directions, the informer returned to the jail and told Respondent that he was unable to locate the body from the previous directions. Respondent then gave more detailed directions, but the police were still unable to find the body. The co-defendant, Freddie Morris, ultimately led the police to the body, which was located in the area described by Respondent in his directions to the informer. 339 So. 2d at 339.

Relying upon this Honorable Cour.'s decision in United States v. Henry, _____ U.S. _____, 65 L. Ed. 2d 115 (1980), the Florida Supreme Court held that Respondent's incriminating statements made to the State informant while in custody in

the Pinellas County jail should have been suppressed because these statements made in the absence of counsel, with no prior waiver of counsel, were directly elicited by the State's stratagem deliberately designed to elicit an incriminating statement from Respondent. Accordingly, the introduction of those statements violated Respondent's sixth amendment right to the assistance of counsel. Detective Carpenter testified that on several occasions he had advised Respondent of his Miranda rights and had attempted to interview Respondent regarding the Tanner and Woodward murders but that Respondent had refused to be interviewed. It was thereafter that the ruse of the cellmate being released was concocted and employed to derive information from Respondent as to the whereabouts of Woodward's body. 390 So. 2d at 339-340.

Accordingly, the Florida Supreme Court reversed Respondent's convictions of all three offenses on the grounds that it was "indirect surreptitious State action" which elicited Respondent's incriminating statements without assistance of counsel. 390 So. 2d at 340-341.

On October 8, 1980, Petitioner filed a Petition for Rehearing to the Florida Supreme Court, therein alleging that the Court improperly interpreted the Henry decision. Petitioner contended that since Respondent had only been indicted for the robbery and Tanner murder at the time he made the incriminating statements concerning the Woodward murder, Respondent's Sixth Amendment rights would not attach to such statements.

Thereafter, on December 8, 1980, the Florida Supreme Court denied Petitioner's request for a rehearing.

Subsequently, Petitioner filed several applications to this Court and the Florida Supreme Court for a stay of judgment and mandate. All applications were denied.

Respondent's retrial was placed on the calendar for March 23, 1981.

ARGUMENT

THIS COURT SHOULD NOT ISSUE THE WRIT SINCE THERE IS NOT ANY REAL AND SUBSTANTIAL FEDERAL QUESTION RIPE FOR REVIEW WHICH WOULD BE DISPOSITIVE OF THE ISSUES IN THIS CAUSE.

As a general rule, in order for a state court decision to be subject to certiorari review by this Honorable Court on the ground that a "federal question" is involved, it is necessary that such a question be "real and substantial." Martin v. Walton, 368 U.S. 25 (1961); Wilner v. Character Committee, 373 U.S. 96 (1963). It is also necessary that a decision thereof should be essential to disposition of the issues presented in the case. Durley v. Mayo, 351 U.S. 277 (1956). The U.S. Supreme Court has always been wary of assuming jurisdiction of a case from state court on grounds of a "federal question," and a policy of strict necessity will be applied. Mental Hygiene Department v. Kirchner, 380 U.S. 194 (1965); Sanks v. Georgia, 401 U.S. 144 (1970).

With regard to assumption of jurisdiction, this Court has generally declined to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions adversely to the party by whom review is sought. Henry v. Mississippi, 379 U.S. 443, 446 (1965).

In its Petition, the State of Florida has not provided a "federal question" as such in accordance with the foregoing requirements. The following discussion of Petitioner's arguments reveal that there is not a "real and substantial federal question" which would be dispositive of the instant cause.

-a-

Since the two murders were related and connected acts within the same occurrence, any constitutional rights flowing from one offense would apply to the other.

Petitioner contends that the Florida Supreme Court improperly applied this Court's decision in United States v. Henry, _____U.S. _____, 65 L. Ed. 2d 115 (1980), by expanding Sixth Amendment rights "to the pre-arrest/pre-indictment investigation stages. . ." [Petition, page 17]. The Petitioner also represents to this Court, and does so erroneously,

> "In the prosecution which gives rise to the instant petition however, Malone had not been arrested or arraigned for any crime in connection with the murder of Jessee Woodward at the time he ill advisely confided in the cellmate informant. Malone was in custody on separate charges and the return of an indictment for the murder of Jessee Woodward was still a month in the future. No formal charges had been filed in connection with the Woodward case which was still in the pre-arrest investigation stages." (See Petition, page 11-12).

In sum, the Petitioner insists that since the Respondent had not yet been indicted or arrested for the particular murder which was the subject of the supposed confession, Respondent's Sixth Amendment rights had not attached.

Quite to the contrary, Malone had been in custody for a connected and related offense. The trial judge in the instant cause had entered an order before trial consolidating the two prosecutions on the grounds that the two murders "are based on the same act or transaction or two or more connected acts or transactions." (See annexed Appendix).

Such consolidation was ordered pursuant to Rule 3.151(a), Florida Rules of Criminal Procedure, which provides in pertinent part:

> ". . . two or more offense are related offenses if they are triable in the same court and are based on the same act or transaction or on two or more connected acts or transactions."

Regarding this rule, in Hall v. State, 66 So. 2d 863 (Fla., 1953), the Florida Supreme Court stated:

> "Trial judges have discretionary power to order consolidation of criminal cases involving two or more informations relating to similar or connected offenses."

In interpreting this rule under Florida law, the court in Paul v. State, 365 So. 2d 1063, 1064 (Fla. 1st DCA, 1979) noted:

> "Factors properly considered in ruling on a motion to consolidate include, but are not limited to, similarity of facts and issues, factors indicating a common scheme or a continuing course of conduct under a single plan or that the offenses grew out of the same chain of circumstances."

Accordingly, since the trial judge granted Respondent's motion for consolidation, he evidently determined under Florida law that the two murders are two connected acts within one continuous transaction. Since the offenses were tried and appealed as one action, it is unthinkable and impossible to separate and categorize the constitutional rights flowing from each of the two intertwined murders.

The factual scheme demonstrates the inseparable interlinking of the two murders which occurred on the same day. Appellant was linked to the Tanner murder only though Woodward's automobile and mysterious disappearance. It is only by use of the automobile stolen from the murdered Woodward that Appellant was able to accomplish Tanner's murder immediately after Woodward's murder. Therefore, the Tanner murder was accomplished by and traced through the Woodward murder.

In addition, the informer was not only briefed by Detective Hazzard on the Woodward murder, but also on the Tanner murder and robbery. [See Petitioner's Appendix to Petition, page A-29].

Thus, the Respondent's Sixth Amendment rights surrounding each of the murders are unserverable, and accordingly, Petitioner's proposed federal question is not "real and substantial." The decision of the Court can be affirmed on

independent and adequate state grounds: that any Sixth Amendment constitutional right stemming from the prosecution of one murder also applies equally to the other murder since the two are part of the same transaction and two connected acts.

-b-

The Florida Supreme Court also relied upon Miranda v. Arizona in reversing Respondent's conviction.

The Petitioner contends that the Florida Supreme Court reversed Respondent's convictions based "solely on this Court's recent decision in Henry. [Petition, page 10]. Accordingly, Petitioner infers a confusion by the Florida Supreme Court on the tests for determining Fifth and Sixth Amendment violations.

However, Petitioner fails to properly apprehend that that the Florida Supreme Court in the instant cause, as did this Honorable Court in Henry, relied substantially on Miranda v. Arizona, 384 U.S. 436 (1966), in reversing Appellant's conviction. In Miranda, the Supreme Court looked to see whether government agents had "deliberately elicited" incriminating statements from the in-custody accused in violation of the accused's Fifth Amendment rights. In making an identical inquiry, the Florida Supreme Court in its decision sub judice expressly found that the informer-cellmate had deliberately elicited Appellant's supposed confession as such in violation of Miranda.

The Miranda decision, relied on by both the Florida Supreme Court herein and by this Court in Henry, 65 L. Ed. 2d at 124, was an in-custody and pre-indictment situation. Miranda's conviction was reversed solely upon a Fifth Amendment violation. The situation sub judice concerning Appellant's supposed "confession" to the Woodward murder was under identical circumstances as was the confession in

Miranda: in-custody and pre-indictment.

Accordingly, the State's proposed "federal question" is not real and substantial. Overtones of Fifth Amendment violations were considered as part of the Florida Supreme Court's decision in question by reliance upon Miranda. This Court obviously also found Fifth Amendment violations in Henry through its reliance on Miranda.

Therefore, although Petitioner's proposed "federal question" may perhaps be of some academic interest in certain circles, the question would certainly not be dispositive of the issues in the instant case.

-c-

The practical effect of Petitioner's arguments would be to circumvent traditional constitutional principles.

It cannot be seriously maintained that Respondent would have been any more or less predisposed to make the incriminating statements even if formal charges had been specifically filed on the related Woodward murder at the time the statements were made. Respondent was in custody and under indictment for the Tanner murder at that time of his "confession" to the informer-cellmate. Respondent was also then aware that he was the focus of the investigation regarding Woodward's mysterious disappearance. Realistically, the existence of an indictment on the Woodward murder had absolutely no bearing on Respondent's falling prey to the informer's scheme which was deliberately designed to elicit incriminating information.

The practical effect of the Petitioner's arguments would be to subvert the constitutional principles set forth in Miranda, Massiah and their progenies. According to Petitioner's theory, custodial authorities could deliberately elicit any and all incriminating statements from accused

persons in custody before an accusatory instrument is filed. Such a practice could and would encourage governmental authorities to deliberately withhold the filing of accusatory instruments for as long as possible so that creative schemes could be used to elicit incriminating statements. This simply cannot be used to circumvent this Honorable Court's enunciations in Henry, Massiah and Miranda.

CONCLUSION

As a matter of Florida law, the two murders are connected acts within the same occurrence. Hence, any constitutional rights flowing from the prosecution of one murder would apply to the other.

The Florida Supreme Court in the instant cause, as did this Court in Henry, relied on the Miranda decision in finding Respondent's confession inadmissible. As being the situation, it is obvious that the Florida Supreme Court inferred Fifth Amendment violations as well.

Based upon the foregoing arguments and authorities, the Petitioner fails to provide a real and substantial federal question which would be dispositive of the instant cause. Accordingly, Respondent respectfully requests this Honorable Court to deny certiorari to the Florida Supreme Court.

Respectfully submitted,

WILLIAM C. McLAIN,
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495 N. Carpenter Street
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(813)533-6715 or 533-1184
Counsel of Record for Respondent

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(813)272-5980
Co-Counsel for Respondent

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR THE COUNTY OF HILLSBOROUGH, STATE OF FLORIDA

CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA :

vs. : CASE NO: 77-5191
77-7178

CHARLES WILLIS MALONE, JR. :

DIVISION: "C"

FILED
1978 FEB 17 PM 2:15
CLERK CIRCUIT COURT
HILLSBOROUGH CO., FLA.

MOTION FOR CONSOLIDATION OF
RELATED OFFENSES

COMES NOW the Defendant, CHARLES WILLIS MALONE, JR., by and through his undersigned attorney, and pursuant to Florida Rule of Criminal Procedure 3.151 moves this Honorable Court to consolidate for trial the offenses charged in Case Number 77-5191-C and Case Number 77-7178-C. In support of said Motion the Defendant would show that the offenses charged in each of said cases are related offenses in that they are triable in the same Court and are based on the same act or transaction or two or more connnected acts or transactions.

WHEREFORE, the Defendant, CHARLES WILLIS MALONE, JR., by and through his undersigned attorney, for the reasons as hereandabove set forth, moves this Honorable Court to grant the relief prayed for.

RICHARD A. LAZZARA, ESQUIRE
202 Governor Street
Tampa, Florida 33602
Phone No: (813) 223-2765
Attorney for the Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to the office of the Hillsborough County State Attorney, Courthouse Annex, Fifth Floor, Tampa, Florida, 33602, on this the 17th day of February, 1978.

RICHARD A. LAZZARA, ESQUIRE

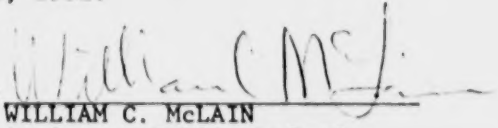
MOTION HEARD, CONSIDERED AND
Granted EXCEPTION
NO: March 3 1978
J. C. Heatwood
JUDGE

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for CHARLES WILLIS MALONE, JR., the Respondent, hereby certify that on February 26, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Brief in Opposition to the State of Florida's Petition for Writ of Certiorari, with attached affidavit, on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to JIM PURDY, Assistant Attorney General, as counsel for Petitioner, at Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

All parties required to be served have been served this date, February, 26, 1981.

BY: 
WILLIAM C. McLAIN
Assistant Public Defender

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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, CHARLES WILLIS MALONE, JR., through his undersigned counsel and pursuant to United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis. The Respondent has been represented by appointed counsel throughout his state court proceedings, and his Affidavit in support of this Motion is attached.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: _____
WILLIAM C. McLAIN
Assistant Public Defender

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

ATTORNEYS FOR RESPONDENT

Case No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

STATE OF FLORIDA,
Petitioner,

vs.

CHARLES WILLIS MALONE, JR.,
Respondent.

AFFIDAVIT

I, CHARLES WILLIS MALONE, JR., being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the Petitioner in the above entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and robbery and sentenced to death by the Circuit Court for Hillsborough County, Florida. On direct appeal, the Supreme Court of Florida reversed the judgments and sentences. I am now responding to the State of Florida's Petition to this Court for a writ of certiorari to the Supreme Court of Florida.

Charles Willis Malone Jr.
CHARLES WILLIS MALONE, JR.

Duly witnessed and sworn to before me, a Notary Public, this 25th day of February, 1981.

[signature]
NOTARY PUBLIC

My commission expires:

Notary Public State of Florida at Large
My Commission [illegible] June 9 1982

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for CHARLES WILLIS MALONE, JR., the Respondent, hereby certify that on February 26, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed in Forma Pauperis, with attached affidavit, on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to JIM PURDY, Assistant Attorney General, as counsel for Petitioner, at Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

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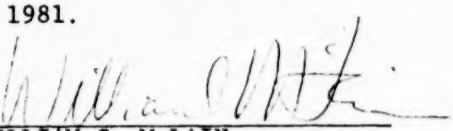
BY: 

WILLIAM C. McLAIN
Assistant Public Defender